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Wills - General Powers of Appointment

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pose as breach becomes moot unless an opportunity to cure is afforded the seller.[33]

Decisions like that of the instant case serve to give the Uniform Commercial Code a desirable and commercially expedient flexibility by accommodating the interests of both buyer and seller in the commercial marketplace.

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WILLS—GENERAL POWERS OF APPOINTMENT—Exercise of a power by a general bequest or devise in a will—The Pennsylvania Supreme Court in applying Section 14(14) of the Wills Act of 1947 has clarified the law by holding that extrinsic evidence is inadmissible to prove a contrary intent.

Jaekel Estate, 424 Pa. 433, 227 A.2d 851 (1967).*

The donor, through the provisions in his will gave the donee a legal life estate in all his property and provided that the donee was to have a general testamentary power of appointment over such property. There was a gift over in default of appointment to a specifically named child of the donor and donee. Subsequently, the donee died and her will provided that the child was to receive the residue of the estate.

At distribution questions arose as to the assessment of the Federal Estate tax liability and whether the Federal Estate Tax attached to the property subject to the power of appointment.[1] These questions were dependent upon whether or not the donee by will had exercised the power of appointment. Under the provisions of Section 2041(a) of the Internal Revenue Code of 1954 if the donee of a general power of appointment exercises the power, the value of the appointive property is included in determining the value of the donee's estate for the purpose of computing the Federal Estate Tax. If the power of appointment was not exercised by the donee then the portion of the tax that would be computed on the value of the appointive property would be avoided.[2] The Orphans Court

33. 228 A.2d at 849.

* Case research was aided by the electronic legal information retrieval techniques of the Health Law Center, University of Pittsburgh.

1. INT. REV. CODE of 1954, § 2041(a).

2. INT. REV. CODE of 1954, § 2041(a).

§ 2041. Powers of appointment

a. In general—the value of the gross estate shall include the value of all property.

1. Powers of appointment . . .—to the extent of any property with respect to which a general power of appointment . . . is exercised by the decedent—

(A) by will . . .

determined that the donee had not exercised the power of appointment.[3] In arriving at its decision the Orphans Court indicated that Section 14(14) of the Wills Act of 1947[4] was applicable. Section 14(14) causes a general bequest or devise to exercise a general power of appointment in the absence of a contrary intent appearing in the will. However, extrinsic evidence[5] was admitted not for the purpose of furnishing the contrary intent, but for "the totally separate purpose of providing guidance and assistance in ascertaining the real and accurate meaning intended by . . . [the donee] . . . in the express and full subsisting and operable testamentary phraseology which she did use."[6]

The Pennsylvania Supreme Court, in an opinion by Justice Jones, reversed the Orphans Court and held that Section 14(14) of the Wills Act of 1947[7] clearly indicates that the intent of the donee not to exercise a power of appointment must appear in the will, and extrinsic evidence as an aid in finding the contrary intent is not admissible. The court noted that in *Provident Trust Co. of Philadelphia v. Scott*,[8] a situation which was governed by Section 223 of the Wills Act of 1917,[9] the effect of the statute could only be overcome by the presence in the will of language clearly indicative of a contrary dispositive intent. The court also noted the existence of several cases[10] in which extrinsic evidence had been considered in regard to a power of appointment. It appeared that a conflict existed between this line of cases and *Provident Trust Co. of Philadelphia*

3. Jaekel Estate, 15 Bucks Co. L. Rep. 350 (1965).

4. PA. STAT. ANN. tit. 20, § 180.14(14) (1947).

"In the absence of a contrary intent appearing therein, a will shall be construed as a real and personal estate in accordance with the following rules:

* * *

(14) Power of appointment. A general devise of the real estate of the testator . . . , shall be construed to include any real estate . . . , which he shall have power to appoint in any manner he shall think proper, and shall operate as an execution of such power. In like manner, a bequest of the personal estate of the testator, . . . , shall be construed to include any personal estate, . . . , which he shall have power to appoint in any manner he shall think proper, and shall operate as an execution of such power.

5. The extrinsic evidence was oral testimony of the scrivner to the effect that the donee believed that nothing remained to be done in the donor's estate, that she, the donee, merely had a life estate therein and, thereafter, everything belonged to the child; and the testimony further pointed to the fact that the donee was very conscious of tax problems and expressed a desire to adjust her affairs accordingly.

6. 15 Bucks Co. L. Rep. at 360.

7. PA. STAT. ANN. tit. 20, § 180.14(14) (1947).

8. 335 Pa. 231, 6 A.2d 814 (1939).

9. Act of June 7, 1917, P.L. 403, § 11 (repealed 1947). Section 14(14) of the Wills Act 1947 is substantially a re-enactment of Section 223 of the Wills Act of 1917.

10. South's Estate, 248 Pa. 165, 93 A. 954 (1915). Thompson v. Wanamaker's Trustee, 268 Pa. 203, 110 A. 770 (1920). Jackson's Estate, 337 Pa. 561, 12A.2d 338 (1940). Rusk Estate, 6 Chester Co. Rep. 188 (1954).

v. Scott.[11] As a result of this conflict the court felt that a guideline should be established to govern the consideration of extrinsic evidence. Only *Rush Estate*[12] of the cases which the court cited as permitting extrinsic evidence, dealt with a situation similar to the instant case. In *Rush*, the Orphans Court allowed evidence by the scrivner and the husband of the testatrix, of the testatrix's belief that she was not a donee of any power of appointment, that her son would automatically receive the property which constituted the trust, and that it was her purpose to treat her husband and son equally. The supreme court in the instant case criticized the consideration of this evidence and stated, "If *Rush Estate* is correct then the extent to which extrinsic evidence is admissible to show a 'contrary intent' would appear to be limitless."[13]

Aside from *Rush Estate*[14] no other Pennsylvania case in which the pertinent section of the Wills Act was involved permitted the admission of extrinsic evidence for the purpose of providing or helping to provide the contrary intent. The other cases recognized by the court involved the consideration of extrinsic evidence as an aid in sustaining the effect of the operation of the Wills Act.[15] In *South's Estate*[16] the court was faced with a situation where the donee of a general testamentary power of appointment over a ten thousand dollar fund left a will in which he gave legacies amounting to ten thousand two dollars. The will contained no residuary clause and made no reference to the power. Testimony was received in which it appeared that there was no estate irrespective of the ten thousand dollar fund and that the donee believed he possessed the ten thousand dollars. The court considered these circumstances and held that the donee had intended to exercise the power of appointment. *Thompson v. Wanamaker's Trustee*[17] involved a testator who, during his lifetime, placed all his realty in a trust of which he was the life beneficiary. He reserved in himself a general testamentary power of appointment and provided that in case of default the realty would go to his children or to issue of his children. He also had established during his lifetime, a fund of securities for his son. The testator's will provided that only a small portion of his residuary estate would go to his son. The will stated that this was done because the testator was making ample provision for his son during his lifetime. It was contended by the son that this manifested an intent not to exercise the power, but to allow the property to go by default. The court permitted evidence concerning the creation of the fund

11. 335 Pa. 231, 6 A.2d 814 (1939).
12. 6 Chester Co. Rep. 188 (1954).
13. 424 Pa. at 442, 227 A.2d at 856.
14. 6 Chester Co. Rep. 188 (1954).
15. The extrinsic evidence considered in these cases was unnecessary in deciding that the power of appointment had been exercised.
16. 248 Pa. 165, 93 A. 954 (1915).
17. 268 Pa. 203, 110, A. 770 (1920).

of securities and stated that the fund was the ample provision the testator had made for his son. The court held that the power of appointment had been exercised and that the effect created by the Wills Act had not been overcome. The court went on to say that the extrinsic evidence considered was not used in rendering the decision.

The supreme court included *Jackson's Estate*[18] in the group of cases which considered extrinsic evidence. *Jackson's Estate*[19] did not involve the issue of exercise or non-exercise, but involved the question of whether a donee, who had expressly exercised the power, intended to blend the appointive property with her own property. The facts indicated the individual estate of the testatrix was insufficient to pay the legacies provided by the will. However, the testatrix had the power of appointment over two trust funds, one created by herself. The residuary clause in the will expressly exercised any powers of appointment and gave the residue to individuals other than the legatees. The legatees contended the testatrix had intended to blend her own property with the appointive property. The court sustained this contention and considered evidence dehors the will[20] to support their decision.

Whether a power of appointment was exercised in the absence of an express statement to that effect has been an issue which has faced a number of courts. In the early days of the Commonwealth, and before the passage of the Act of June 4, 1879, if a will was to be construed as an exercise of a power of appointment, the intent of the donee to exercise the power had to appear in the instrument. Three situations were recognized which demonstrated the presence of this intent: (1) where there was some reference to the power in the executing instrument; (2) where there was a reference to the property which was the subject of the power; (3) where the instrument of exercise would have no operation whatever, except as an execution of the power.[21] The mere presence in a will of a general bequest or general devise was insufficient to exercise powers of appointment.[22] The general bequest or devise only operated to pass the testator's property; since a power of appointment was not considered the donee's property a general bequest or devise with nothing more was insufficient.[23] This reasoning, however, usually defeated the actual intent

18. 337 Pa. 561, 12 A.2d 338 (1940).

19. *Id.*

20. The evidence considered by the court was (1) the testatrix had created one of the trust funds with her own money (2) the relationship of the testatrix to the legatees (3) the testatrix own estate was insufficient to pay the legacies and (4) the testatrix gave no instruction to the scrivener, who was not a member of the bar, from which fund the legacies were to be paid.

21. Wetherell v. Wetherell, 18 Pa. 265 (1852). Bingham's Appeal, 64 Pa. 345 (1890).

22. *Id.*

23. Wetherell v. Wetherell, 18 Pa. 265 (1852). SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 973

of the testator-donee. As a result the legislature passed the Act of June 4, 1879[24] which specified that the presence of a general bequest or devise would operate as an exercise of the power unless a contrary intent appeared in the will. In other words, the 1879 Act created a rebuttable presumption the purpose of which was to supply the common law requirement, that the intent to exercise a power of appointment be manifested in the will. Moreover, the presumption continued to operate even when the will had been executed prior to the creation of the power.[25] Since the Act created a presumption in favor of the exercise of a power of appointment the burden of producing evidence to the contrary was placed on the party who asserts non-exercise and this burden can only be satisfied with evidence contained in the instrument.[26]

Jaekel Estate[27] reiterates this interpretation and eliminates any confusion which existed concerning the admissibility of extrinsic evidence. Section 14(14) of the Wills Act of 1947[28] creates a presumption in favor of the exercise of a power of appointment by the will and dictates that the source of an intent on the part of the donee of a power not to exercise a power of appointment must be in the language and provisions of the will.[29]

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24. Act of June 4, 1879, P.L. 88.

25. Blackburn's Estate, 290 Pa. 55, 138 A. 538 (1927). Morris's Account, 298 Pa. 540, 148 A. 843 (1930).

26. Aubert's Appeal, 109 Pa. 447, 1 A. 336 (1885).

27. 424 Pa. 433, 227 A.2d 851 (1967).

28. PA. STAT. ANN. tit. 20 § 180.14(14) (1947).

29. The Pennsylvania courts in applying some of the other sub-sections of Section 14 of the Wills Act of 1947 or their predecessors have stated that any contrary intent must be expressed in the will. See Kautz v. Kautz, 365 Pa. 450, 76 A.2d 398 (1950), (devises of real estate); Metzgar Estate, 395 Pa. 322, 148 A.2d 895 (1959), (time of ascertaining a class); Smith v. Piper, 231 Pa. 378, 80 Atl. 877 (1911), (meaning of "die without issue"); Collins Estate, 393 Pa. 161, 142 A.2d 263 (1958), (adopted children).